

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

-----oo0oo-----

GENERAL INSURANCE COMPANY OF
AMERICA, a Washington
corporation; FIRST NATIONAL
INSURANCE COMPANY OF AMERICA,
a Washington corporation; and
SAFECO INSURANCE COMPANY OF
AMERICA, a Washington
corporation,

Plaintiffs,

v.

CORPORATE CONTROL, INC., a
California corporation; HI-
VOLTAGE WIRE WORKS dba POWER
PROVIDERS, a California
corporation; UNITED UTILITIES,
INC., a California
corporation; SUPPLY SOURCE,
INC. dba EXTRA EQUIPMENT, a
California corporation; TRADE
TECH. INC., a California
corporation; STEVE K. ZINNEL,
an individual; MICHELLE
ZINNEL, an individual; ZINNEL
FAMILY TRUST DATED DECEMBER
14, 1998 through its trustee,
STEVE K. ZINNEL; and DOES 1
through 100, inclusive,

Defendants.

NO. CIV. S-02-1020 WBS PAN

MEMORANDUM AND ORDER
RE: MOTION FOR RELIEF FROM
JUDGMENT

-----oo0oo-----

1 Defendant Steve K. Zinnel moves this court for relief
2 from a judgment plaintiffs obtained against him in this action on
3 the ground that the judgment has allegedly been substantially
4 satisfied by Swinerton Walberg Co. ("Swinerton"), a nonparty.
5 The court experiences something akin to déjà vu as it realizes
6 that this is the third time within the history of this case that
7 Mr. Zinnel has argued that he is entitled to offset any judgment
8 against him with payments on a contract balance plaintiffs
9 allegedly received from Swinerton. (See June 23, 2004 Reissued
10 Mem. & Order Re: Pls.' Mot. for Summ. J. ("June 23, 2004 Reissued
11 Mem. & Order") at 36 n.24; August 26, 2004 Mem. & Order Re: Mot.
12 for Reconsideration (Pls.' Claims) at 20) (addressing same
13 argument). This latest reincarnation of Mr. Zinnel's argument is
14 no more persuasive the third time around.

15 I. Factual and Procedural History

16 On or about May 10, 2002, plaintiffs filed an action
17 against Mr. Zinnel and his codefendants (collectively
18 "defendants"), alleging claims for (1) breach of contract; (2)
19 exoneration/quia timet; (3) injunctive relief; (4) specific
20 performance; (5) statutory indemnity; and (6) equitable
21 subrogation. Thereafter, on April 12, 2004, plaintiffs filed a
22 motion for summary judgment against all defendants seeking, among
23 other things, \$2,799,642.51 in contract damages from defendants.
24 (See June 23, 2004 Reissued Mem. & Order at 36 n.24). Because
25 genuine issues of material fact remained as to defendants'
26 liability for some of the requested damages, the court found
27 defendants jointly and severally liable for only \$1,192,509.28 in
28 contract damages at the summary judgment stage, though additional

1 relief was granted on a separate claim. (See id. at 36-37).

2 Some of the contract damages for which the court found
3 defendants liable were a result of losses plaintiff General
4 Insurance Company of America ("General Insurance") incurred from
5 issuing performance and payment bonds on behalf of defendant Hi-
6 Voltage Wire Works dba Power Providers ("Power Providers"). (See
7 id. at 7). Before issuing these bonds, plaintiffs had entered
8 into an agreement with defendants whereby defendants agreed to
9 indemnify plaintiffs for any losses incurred from issuing the
10 bonds. (June 23, 2004 Reissued Mem. & Order at 2-4). These
11 bonds related to a contract Power Providers had entered into with
12 Swinerton to perform electrical work on the Embassy Suites Hotel
13 in Sacramento, California ("Embassy Suites Project"). (Id. at 7).

14 In a declaration submitted in opposition to plaintiffs'
15 motion for summary judgment, Mr. Zinnel stated that "[a]s of
16 November 28, 2001[,], Power Providers had been paid \$962,656.20 by
17 Swinerton on the Embassy Suites Hotel project and the contract
18 had an unpaid balance of \$1,180,244.80." (Zinnel Decl. in Supp.
19 of Zinnel's Opp. to Pls.' Mot. for Summ. J. ¶ 17) (capitalization
20 omitted). However, after Swinerton allegedly failed to pay Power
21 Providers for some other work on the Embassy Suites Project,
22 Power Providers stopped work on the project on or about December
23 26, 2001. (See id. ¶¶ 23-24). General Insurance then took over
24 and completed the project as it was authorized to do by contract
25 and incurred \$1,915,478.05 in losses from the bond. (See June
26 23, 2004 Reissued Mem. & Order at 7, 30). Defendants' refusal to
27 honor their agreement to indemnify plaintiffs for those losses
28 led plaintiffs, in part, to file their motion for summary

1 judgment.

2 In opposing that motion, Mr. Zinnel referenced the
3 aforementioned \$1,180,244.80 balance on the contract between
4 Swinerton and Power Providers for work on the Embassy Suites
5 Project and some additional outstanding balances on other
6 contracts. He stated that plaintiffs "provide[d] no credit for
7 the \$1,301,083.68 cumulative balance uncollected on the
8 contracts" and produced a schedule summarizing this information.
9 (See Zinnel Decl. in Supp. of Zinnel's Opp'n to Pls.' Mot. for
10 Summ. J. ¶ 70, Ex. 26). However, because Mr. Zinnel failed to
11 explain how this balance affected or offset plaintiffs' specific
12 claims, the court found this evidence unpersuasive. (See June
13 23, 2004 Reissued Mem. & Order at 36 n.24; see also August 26,
14 2004 Mem. & Order Re: Mot. for Reconsideration (Pls.' Claims) at
15 20(explaining court's reasoning in more detail)).

16 The court then went on to determine that defendants
17 were jointly and severally liable to plaintiffs for \$406,884.81
18 in losses plaintiffs incurred from issuing the bonds on the
19 Embassy Suites Project. (See June 23, 2004 Reissued Mem. & Order
20 at 29-32, 32 n.18). However, the court refused to find
21 defendants liable, at the summary judgment stage, for the
22 remainder of the \$1,915,478.05 in losses plaintiffs claimed on
23 the same bonds because there were genuine issues of material fact
24 as to whether those particular losses were incurred in good
25 faith. (See id. at 31-32, 32 n.18). The remainder of the
26 \$1,192,509.28 in contract damages for which the court found

1 defendants liable arose from bond losses on other projects.¹

2 On or about July 16, 2004, Mr. Zinnel filed a motion
3 for reconsideration of the summary judgment order. In his
4 memorandum of points and authorities in support of that motion,
5 Mr. Zinnel again argued that the alleged uncollected balances
6 from various projects should offset the judgment by
7 \$1,301,083.68. (See Zinnel's Mem. of P. & A. in Supp. of Mot.
8 for Reconsideration of Summ. J. at 8). That \$1,301,083.68 again
9 included \$1,180,244.80 allegedly owed on the Embassy Suites
10 Project. (See id.).

11 The court denied Mr. Zinnel's motion for
12 reconsideration on August 26, 2004. In doing so, the court noted
13 that it had considered the information contained in Mr. Zinnel's
14 schedule. However, the court determined that the information in
15 the schedule failed to create a genuine issue of material fact
16 because Mr. Zinnel had not presented any evidence indicating that
17 the amounts listed on the schedule should offset specific claims
18 paid by plaintiffs on the relevant bonds. (See August 26, 2004
19 Mem. & Order Re: Mot. for Reconsideration (Pls.' Claims) at 20).

20 On October 26, 2004, the court entered a final judgment
21 that disposed of all claims to all parties. (See October 26,
22 2004 Judgment). Mr. Zinnel appealed the October 26, 2004
23 judgment on or about November 23, 2004. (See Def. Zinnel's Index
24 of Attached Exs. in Supp. of Steve K. Zinnel's Mot. for Relief
25 from J. & Mot. for Stay of Execution of J., Ex. 3 (Def. & Cross-

26
27 ¹ See id. at 25, 28, 33 (noting respective losses of
28 \$120,846.74, \$38,000, \$58,288.64, \$560,989.09, and \$7,500 on
other bonds issued for work on other projects).

1 Def. Steve K. Zinnel's Notice of Appeal)).

2 Thereafter, Mr. Zinnel reviewed the billings and
3 payments Power Providers received on the Embassy Suites project
4 again. Based on this review, Mr. Zinnel declares that he
5 prepared a schedule titled "Balance to collect on contract
6 schedule as of July 2002." In that schedule, Mr. Zinnel
7 represents that Swinerton paid Power Providers \$962,656 on a
8 \$2,142,901 contract leaving a balance of \$1,180,245 on the
9 contract. Mr. Zinnel then states that "[his] research leads
10 [him] to believe that plaintiffs have collectively collected
11 \$1,180,245." (Zinnel Decl. ¶ 4; Zinnel's Index, Ex. 11 (Contract
12 Schedule)). Based on the schedule he prepared and the inferences
13 he draws from that schedule, Mr. Zinnel now files this motion for
14 relief from judgment pursuant to Federal Rule of Civil Procedure
15 60(b)(5). If that relief is denied, Mr. Zinnel moves the court,
16 on unspecified grounds, to order plaintiffs to provide copies of
17 payments he believes they received from Swinerton on the Embassy
18 Suites project.²

19
20 ² Mr. Zinnel also objects to plaintiffs' oppositions and
21 certificates of service on the ground that they were not properly
22 served. (See Steve K. Zinnel's Objection to Pls.' Certificates
23 of Service & Opp'ns at 1,4). He contends that, contrary to the
24 statements in plaintiffs' certificates of service, he was never
personally served with the relevant documents on June 13, 2005,
but rather that he found them on the front porch of his personal
residence on June 14, 2005. (Zinnel Decl. in Supp. of Objections
¶¶ 5,7).

25 Mr. Zinnel's objection is unavailing. Local Rule 5-135
26 allows pro se litigants, like Mr. Zinnel to be "conventionally
27 served." "Conventional service" is defined as service
28 "accomplished by traditional means (either personal or mailing)
pursuant to Fed. R. Civ. P. 5(b)(2)(A)-(C). . . ." Local Rule 1-
101. Federal Rule of Civil Procedure 5(b)(2)(B) allows for
service by mail and states that such service is complete on
mailing. Mailing can be accomplished by messenger service. See

1 II. Discussion

2 Federal Rule of Civil Procedure 60(b)(5) provides that
3 "the court may relieve a party . . . from a final judgment . . .
4 [if] the judgment has been satisfied, released, or discharged . .
5 . ." Fed. R. Civ. P. 60(b)(5). Relief under Rule 60(b) is,
6 however, considered extraordinary and granted only in exceptional
7 circumstances. Sellers v. Mineta, 350 F.3d 706, 716 (8th Cir.
8 2003). A party seeking relief from a final judgment based on
9 satisfaction of the judgment bears the burden of proving that the
10 judgment has been satisfied. Tungseth v. Mutual of Omaha Ins.
11 Co., 43 F.3d 406, 409 (8th Cir. 1994). A party may not seek
12 relief from judgment simply to relitigate matters settled by the
13 original judgment. Donovan v. Sovereign Sec., Ltd., 726 F.2d 55,
14 60 (2d Cir. 1984).

15 Mr. Zinnel has failed to provide the court with any
16 evidence to establish that plaintiffs' judgment has been
17 satisfied other than the schedule of payments he created after
18 reviewing billings and payments Power Providers received from
19 Swinerton. This evidence is not enough to meet Mr. Zinnel's
20 burden on this motion.

21 _____
22 In re: William B. Kessler, Inc., 29 B.R. 358 (S.D.N.Y. Bankr.
23 1983) (finding delivery by messenger service to be proper).

24 Mr. Zinnel does not challenge the sworn statements in both
25 of plaintiffs' certificates of service to the effect that the
26 documents were placed in a properly addressed envelope and served
27 on him by messenger service on June 13, 2005. (See Pls.' June
28 13, 2005 Certificate of Service at 2-3; Pls.' June 14, 2005 Am.
Certificate of Service at 2-3). Nor does he deny that he
received the relevant documents. Instead, he freely admits he
found them on his porch on June 14, 2005. (Zinnel Decl. in Supp.
of Objections ¶ 5). Therefore, Mr. Zinnel's objections to
service are overruled.

1 At best, Mr. Zinnel's evidence suggests that Swinerton
2 owed Power Providers (one of Mr. Zinnel's codefendants)
3 \$1,180,245 on a contract for work on the Embassy Suites Project.
4 This suggestion is itself dubious because Power Providers ceased
5 work on the project such that General Insurance was obliged to
6 take over the project. (See Reissued Mem. & Order at 7, 30).

7 But whatever inference Mr. Zinnel's evidence raises as
8 to whether Swinerton owed Power Providers under the contract, it
9 does not establish that plaintiffs collected \$1,180,245 from
10 Swinerton. Mr. Zinnel's declaration that "[his] research leads
11 him to believe that plaintiffs have collectively collected [the]
12 \$1,180,245" is unavailing. (Zinnel Decl. ¶ 4). The only
13 research Mr. Zinnel cites to support this belief is his review of
14 the billings and payments Power Providers received from
15 Swinerton. (See Zinnel's Index, Ex. 11 (Contract Schedule)). As
16 explained in two previous orders, the fact that Swinerton may
17 have owed Power Providers money does not establish that
18 plaintiffs recovered that money or that their judgment against
19 Mr. Zinnel was somehow satisfied. (See June 23, 2004 Reissued
20 Mem. & Order at 36 n.24; Mem. & Order Re: Mot. for
21 Reconsideration (Pls.' Claims) at 20). A Rule 60(b) motion is
22 not meant to be an opportunity for Mr. Zinnel to make a twice-
23 rejected argument for a third time to the same court in yet
24 another effort to relitigate the same matter. See Donovan, 726
25 F.2d at 60. Because Mr. Zinnel has once again failed to
26 demonstrate that plaintiffs' judgment has been satisfied, his
27 request for relief under Rule 60(b)(5) must be denied. See
28 Tungseth, 43 F.3d at 409.

1 Mr. Zinnel cites no authority, other than "equity and
2 fairness," for his alternative request for a court order
3 compelling plaintiffs to produce documentation of payments
4 received from Swinerton for work on the Embassy Suites Project.
5 (See Def. Steve Zinnel's Reply to Pls.' Opp'n at 8). Equity and
6 fairness are not in Mr. Zinnel's favor. Rather, both would be
7 offended by rewarding Mr. Zinnel's needless relitigation of this
8 issue with an order compelling plaintiffs to produce documents so
9 that Mr. Zinnel could relitigate the matter again for a fourth
10 time. Furthermore, plaintiffs contend that they have not found
11 any legal authority for compelling them to produce these
12 documents postjudgment. (See Pls.' Opp. to Def. Steve K.
13 Zinnel's Mot. for Relief from J. at 5). Nor has the court found
14 any such authority. Because equity disfavors this request and
15 because the court has no apparent legal authority to grant it,
16 this request is also denied.

17 If Mr. Zinnel continues to disagree with this court's
18 judgment, his remedy is to appeal to the United States Court of
19 Appeals for the Ninth Circuit, not to continue to seek
20 reconsideration of the judgment in this court.

21 IT IS THEREFORE ORDERED that defendant Steve K.
22 Zinnel's motions for relief from judgment and for a court order
23 compelling plaintiffs to produce documentation of payments

24 ///

25 ///

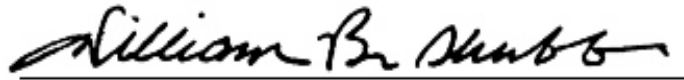
26 ///

27 ///

28 ///

received from Swinerton be, and the same hereby are, DENIED.

DATED: June 27, 2005

A handwritten signature in black ink, reading "William B. Shubb", written over a horizontal line.

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE